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In The

# Supreme Court of the United States

October Term, 1990

LAWRENCE B. GREENE, *et ux.*,

*Petitioners,*

*vs.*

BARBARA BALABER-STRAUSS, as Trustee, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Are the present Bankruptcy Rules under which individuals have to file for the protection of the Bankruptcy Code , a violation of the individual rights granted to all the people under the Constitution of the United States of America?

2. Did the Courts below err in not granting the Greene's a new trial in the light of the fact that the Greene's were denied their right to due process under the rules and law's of the Bankruptcy code?

3. Did the Courts below err in not returning the case to the bankruptcy court for the court to decide the issue of if the party who objected to their discharge in bankruptcy had standing to litigate this matter?

4. Did the Courts below err in not reconizing that the Greenes were never informed of the basis of the litigation that they were forced to defend pro se ?

5. Did the Courts below err when they denied the Greene's a new trial , in light of the Order of

to the use of their own funds to retain the assistance of Counsel for their defence?

6. Did the Courts below err in not returning this case to the Bankruptcy Court so that the Greene's with the aid of an attorney could present the bankruptcy Court with the new evidence that they had?

7. Did the Courts below err in finding that the bankruptcy Judge had the right to change existing laws and rules of the Bankruptcy Code under 105 .01 of the bankruptcy code?

8. Were the Greene's individual Constitutional rights violated by this untimely litigation ?

9. Can an individual effectively represent themselves in a civil matter , in a bankruptcy proceeding?

10. Did the Courts below err in denying the Greenes a new trial , or return this case to the bankruptcy court so that the bankruptcy Court could correct his findings of fact and after correction decide if the Greene's should be granted their right to a discharge in bankruptcy?

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SUPREME COURT OF THE UNITED STATES

No. A-199

Lawrence B. Greene, et ux.,

PETITIONERS

V.

Barbara Balcher-Strauss, as Trustee, et al.

PETITION FOR A WRIT OF CERTIORARI

## STATEMENT OF THE GROUNDS ON WHICH THIS COURT HAS JURISDICTION

This Petition for a Writ of Certorari time to file had been extended by Thurgood Marshall, Associate Justice of the Supreme Court of the United States , on September 13,1990.

The orders and decision requested to be reviewed by this Court arise out of an appeal to the United States Court of Appeals for the Second Circuit, and their Mandate. The original decision to affirm the District Courts decision was dated April 26, 1990 and the Mandate was entered on June 29,1990.

This Writ of Certorari is being submitted pro se due to the fact that we do not have the funds to retain an attorney. The judgments in question arise out of a bankruptcy case. At question are the rules and laws governing the discharge of a debtor in bankruptcy and other laws related to the holding of trials .

Many of the questions presented for review relate to a debtors rights in bankruptcy and the right of an individual to their rights under the Constitution of the United States of America. The constitutional amendments refered to are Amendment I the right of an individual to petition the Government for a redress of grievances. Amendment IV , Amendment V the portion thereof that refers to not be deprived of life , liberty , or property, without due processof the law , nor shall private property be taken for public use, without just compensation. Amendment VI the right to have the Assistance of Counsel for his defence, and . .to be informed of the

nature and cause of the accusation. Amendment VIII Excessive fines imposed, or cruel and unusual punishments inflicted. Amendment IX The enumeration in the Constitution , of certain rights, shall not be construed to deny or disparage others retained by the people.Amendment XIII Section 1. involuntary servitude. Amendment XIV Section 1.

## BRIEF STATEMENT OF THE CASE

This bankruptcy case has a long and tangled history. Therefore we will just briefly state only parts of the case which directly relate to the issues presented for review to this Court.

On March 28, 1985 the Greenes voluntarily filed a petition under Chapter 13 of the Bankruptcy code, pro se . The Greenes' Chapter 13 Petition , was challenged by Gibraltar Corporation of America, on the grounds that the amount of the unsecured and secured debt owed by the Greenes exceeded the statutory ceiling. Following a pro se trial before Judge Schwartzberg, the bankruptcy Court entered an Order dismissing the Chapter 13 Petition and fixed the amount of their claim.

The Greenes' pro se went to file an appeal of the decision to dismiss their Petitions and the fixing of the amount of the claim. It was discovered that the audio tape of the trial was lost or damaged and as a result the entire trial had to be repeated. Following a second trial, held less than two

weeks after pro bono counsel obtained an order permitting a new trial, Judge Schwartzberg again dismissed the Chapter 13 Petition. The Greenes appealed from that dismissal. In order to wait for the District Courts decision on the appeal and to protect their property rights , the Greenes with the aid of the appointed attorneys filed for protection of the Bankruptcy Code under Chapter 11 of the code, ( a pro se can not file a petition under Chapter 11 without the aid of an attorney) , on October 21,1985.

On February 5, 1986, while the appeal from dismissal of the Chapter 13 was pending before Judge Brieant, the Bankruptcy Court entered an order upon Gibraltar's motion , converting the Chapter 11 to a Chapter 7.

On or about February 14,1986 , the Trustee was appointed as Trustee of the Debtors' estate and pursuant to notice under Section 4004(a), on or around February 11, 1986, the Bankruptcy Court notified all creditors and the Trustee and the attorneys for the Greenes' that May 6, 1986 was fixed"... as the last day for the file-

ing of objections to the discharge of the debtor." Moreover, the Notice set the first meeting for creditors for March 7,1986.

On or before May 6,1986 there is no question of the fact that no creditor nor the trustee filed a complaint objecting to the debtors discharge. In addition the trustee did not request an extention of time within which she could file an objection to the debtors discharge.

On June 19,1986 , Judge Charles Brieant entered an order dismissing the Greenes' appeal as moot. the order added, however, that the Bankruptcy Court might hold additional hearings and take additional evidence on the amount of Gibraltar's claim and reached no decision as to whether the Bankruptcy Court's finding of the amount of the Gibraltar claim in the Chapter 13 case would have res judicata effect on the subsequent Chapter 11.

Thereafter the Trustee obtained an order allowing her to sell the Greenes home , over the objections

of the Greenes' filedby their pro bono attorneys , that the sale of the Greenes' home was premature due to the fact that the Greenes' have not yet objected to the claim of Gibraltars based upon the recent decision of the district court. The significant factor in the conversion of the Greenes' chapter 11 case was the amount of the Gibraltar claim.

The Greene's pro bono attorneys advised the Greenes that they could no longer afford to represent them pro bono and that the Greenes sould allow them to withdraw as their attorneys. The Greenes' agreed that if they would inform the court of the reason that they wished to withdraw from their case they would not object. The Greenes' pro bono attorneys refused to advise the Court of the reasons why they wished to withdraw and as a result they did not withdraw as the attorneys of record and they did not appear for the Greenes thereafter.

The Greenes' pro se obtained a temporary stay of the sale of their home from the district Court and from the Court of Appeals., without having the ability

to properly present their briefs the stays were lifted, and the trustee sold the Greenes' home.

The trustee obtained an exparte order ousting the Greenes' from their home before their home was sold although she had agreed to allow the Greene's to remain in their home till the sale was final , so that they would have the time to pack their personal property and find a place to live. The Greenes' were ousted from their home without due process and without their personal property and so were their children who were were not under the jurisdiction of the bankruptcy court. Without going into this period of time during which the Greenes' had no where to live and had no access to their personal property that remained in their home. The trustee refused the Greenes' request to allow them a reasonable amount of time to pack and remove their property from their home. As a result the bankruptcy court allowed the trustee to pack and remove and store the Greenes' and their childrens property. The trustee did not have all of the Greenes property removed from their home and as a result the new owners refused to

allow the Greenes' to remove their property from their home and they kept some of the Greenes property and the balance of the Greenes' property was placed in the garbage. The new owners informed the Greenes' of these facts by letters.

Thereafter the Greenes' who had no money to obtain an aparment and had to remain in a motel due to this. The Greenes' needed their homestead exemptions so that they could obtaine an apartment to live in and so that they could obtain some legal advise, made a motion to the bankruptcy Court to obtain their homestead exemptions that the trustee refused to turn over to them.

The bankruptcy court granted the Greene's their homestead exemptions (the exemptions were New York State exemptions ). Based upon bankruptcy law a trustee can set off certain amounts against a debtors' homestead exemptions under Section 522 of the bankruptcy code. The Trustee filed objections to the Greenes obtaining their homestead exemptions and a trial was held , with the Greenes' appearing pro se . After the

full trial the bankruptcy Judge found that the trustee had no valid set offs against the Greenes' homestead exemptions and the entire amount of the Greenes' homestead exemptions belonged to them. When the Greenes' requested that the trustee turn their homestead exemptions over to them the trustee refused . As a result of the Greenes' desperate need for this money they requested that the bankruptcy court have the trustee turn their money over to them. The bankruptcy Judge found that there is no where listed in the bankruptcy code a time when a trustee was required to turn over to a debtor their properly allowed and claimed homestead exemption or infact any of a debtors exemption. The bankruptcy court entered an order stating that the trustee was not required to turn over to the Greenes their homestead exemption till the case was fully admistrated and all of the creditors were paid under Section 726 of the code.

As a result of this the Greenes who needed this money to pay the rent on the new apartment that they had found , the Greenes were evicted for

paying their rent late..

On or about August 20,1986 the Greenes received a letter from an attorney who had represented a corporation formerly operated by the Greenes. Enclosed with that letter was a copy of a Summons and complaint for an action pending in New York State Supreme Court entitled Maurice Baer v. Forum Narrow Fabrics, Inc. Lawrence Greene and Helena Greene.

Thereafter, the Greenes advised counsel of record for Baer in the Baer Action that the corporate defendant had been out of business since 1983. The Greenes' also advised counsel of their personal bankruptcy.

Although contending that they had no personal liability to Baer, the Greenes, upon advice of their counsel, amended their list of creditors to include Baer and intended to object to Baer's claim thereafter. At the same time. the Greenes realized that certain other debts were not included in their schedules and they amended their schedules to include these claims as well. On October 27, 1986 the Greenes, in accordance with Bankruptcy Rule 1009 , filed amended

schedules adding these additional creditors, including Baer.

After the Greenes voluntarily amended their schedules, the Bankruptcy Court, on October 27, 1986 sent out a written notice advising the additional creditors identified by the Greenes that— ( briefly) they were listed as a creditor and that this notice was sent to you so that you may take such action as you deem appropriate to protect your interest. The Court fixed December 26, 1986 as the last day for the filing of a complaint to determine dischargeability of any debt pursuant to 11 U.S.C 523 (c) or 727 (a).

On October 31 ,1986 , an ex parte hearing was held on Baer's motion to be added to the list of creditors, although the Greenes had already amended their schedules to include Baer. Although the Court was aware that the Greenes were due in court the Bankruptcy Judge did not adjourn this hearing till the Greene's would be present. At this ex parte hearing the trustee was also present and raised the the question of if the extention of time allowed Baer would also flow to the trustee. in so far as this is a new claim

the Court responded to the Trustee's request " Yes . you can put that in the order.

Subsequently, an order was entered on November 26, 1986 which allowed Maurice Baer to file his claim , and fixed December 26,1986 as the last day for the filing of the Complaint to determine discharge or the dischargeability of any debt pursuant to 11 USC 523(c) or 727(a). The trustee's name was not added to this order . The trustee did not file any order in accordance with the courts instructions.

Thereafter while the Greenes' were still apearing pro se Baer and the Trustee filed a joint complaint . While denominated a joint complaint ,. consisting of three causes of action, the first two related to Baer's claim that the debt owed him was not dischargeable under 523. The last cause of action purportedly brought by both the Trustee and Baer, was brought pursuant to Section 727. That cause of action principally alleged; Defendants have concealed, discharged mutilated falsified and/ or failed to keep or preserve any records information including books documents records and papers from which the debtors financial condition or

business transactions might be ascertained. Repeated requests for books and records by the Trustee have been ignored by the defendants.

Thereafter due to the fact that the Greenes' did not know what to do they went to the pro bono attorneys and insisted that they either withdraw as their attorneys or appear for them as they did not know how to proceed . In addition at this time the Greenes' pro se appeal to the Court of Appeals of Judge Brieants decision to call the Greenes appeal of their dismissal of their Chapter 13 petitions "MOOT" was decided. Based upon the fact that the Court of Appeals affirmed Judge Brieants decision and found that there had never been a final determination of the Gibraltar claim in the present bankruptcy proceedings , we could finally file our objection to the Gibraltar claim in these proceedings . The pro bono attorneys agreed to actively represent us on certain matters based upon the fact that a hearing to allow them to withdraw as our attorneys the bankruptcy Judge intimated that he would not allow them to withdraw.

Following the filing of the Joint complaint, which was based upon the Greenes' alleged failure to turn over record, the Trustee made an ex parte motion before the Bankruptcy Court for an order directing the turn over of records. On January 16,1987 the Court without notice to the Greenes, entered an order directing the Greenes and their attorneys to turnover to the Trustee their financial records.

Subsequent to enry of the Turnover order, the trustee and the attorneys then representing the Greenes entered into discussions which ended in delivery to the trustee of extensive records.. In fact the record discloses during the period of January 1987 through at least July 1987 the Trustee's dealings with respect to documents were with the Greenes attorneys.

The Greenes counsel served Interogatories and requests for documents pursuant to Rule 7026 of the Bankruptcy Rules upon the Trustee. The Trustee produced no documents pursuant to this request. Not only that, the Trustee's answers to the Interrogatories provided no clue to what it was she was complaining about.

Not only did the Trustee keep her claim a secret, she conducted her discovery in secrecy as well.

Based upon the written agreement that the Greenes were forced to sign inorder for them to represent the Greenes' the Greenes were not advised by their attorneys of what was happening.

In the summer of 1987 the Greenes and their attorneys had a difference of how they should proceed in a different matter and as a result of the agreement that the Greenes signed , their attorneys were allowed to with draw from their case. Thereafter to make matters worse, the Greenes had difficulty in obtaining their files from their counsel.

On or about September 1987 the Greenes made a motion to the Bankruptcy court to appoint replacement pro bono attorneys to their case or the use of estate funds to retain an attorney or the debtors homestead exemptions so that they would be able to retain an attorney. The bankruptcy court entered an order which denied the Greenes motion . There was no appointment of replacement pro bono attorneys to the Greene's case.

On December 14,1987 without discovery without counsel and virtually without a clue as to what they were charged with, the Greenes were forced to go to trial on the Joint Complaint. At the outset the Greenes advised the Court that they were not represented by counsel and that they had not received answers to their discovery requests. The Court denied the Greenes application to preclude the Trustee from going forward.

At the trial the Greenes tried to defend themselves and present the truth but because of the happenings in their case and the fact they did not have an attorney to confer with they did not know how to defend themself. As a result the bankruptcy court entered orders on January 20, 1988 which denied the Greenes their discharge in bankruptcy. It is from that written decision and the orders entered thereafter that the Greenes appealed to the District Court . In addition the Greenes made a motion prior to their filing their appeal for a a new trial and the bankruptcy Judge again denied their motion. The three decisions and orders

were the subject of the consolidated appeal to the District Court and the Decision of the District Court that was rendered on July 19,1989 which affirmed the decisions of the bankruptcy court were appealed to the Court of appeals. The Court of Appeal affirmed the District Courts decision.

The United States Court of Appeals for the Second Circuit, decision to affirm the decision of the district court decision on our appeal of the bankruptcy courts decision to deney the Greenes their discharge in bankruptcy is in direct conflict with the provisions of the Bankruptcy Code. The carefully crafted Bankruptcy Code scheme should not be upset by a Court finding of the right of a Bankruptcy Judge to change existing laws and rules when congress is empowered to make the rules and laws or correct the rules and laws governing the bankruptcy code. The Court found that under 105.1 of the bankruptcy code gave the right to the Bankruptcy Judge to change the current rules and laws of the bankruptcy code.

The Court below by affirming the District Courts decision is in direct conflict with decisions of the Supreme Court of the State of New York Appellate Division, First department in the opinions In re Beiny, 132 A.D. 2d 190 522 N.YS. 2d 511 ( 1st Dept 1987 ) and in re Beiny, 129 A.D. 2d 126,517 NY S 2d 474 ( 1st Dept 1987), sanctioned the firm Sullivan & Cromwell for the sort of behavior the trustee engaged in this case. There, Sullivan & Cromwell misused a subpoena to obtain documents and then refused to turn the documents over to other parties. The trustee's protestantions that her actions here were proper are similar to Sullivan & Cromwell's attempt to explain away their conduct there.

The Decision of the Court below is in direct conflict with many of their own decisions and other Courts decisions not necessaryly in bankruptcy matters but with regards to due process and other constitutional rights of individuals especially pro se defendants.

Many of the issues raised in our appeal had never been raised before and they need this Courts review.

BEST AVAI

WHEREFORE the Greenes' respectfully request this Courts review of the lowers Courts decisions in the Greenes bankruptcy case, as the Greenes' have been irreparably harmed due to the facts that they have not been discharged in bankruptcy and never will be able to recover from these bankruptcy proceedings.

Respectfully submitted,

Dated: New York , N Y
November 16, 1990

HELENA GREENE &

LAWRENCE B. GREENE pro se

By: Helena Greene

HELENA GREENE
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LABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MANDATE

SDNY
87-Civ-8091
GOETTEL

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 26th Day of April, one thousand nine hundred and ninety.

PRESENT:

HONORABLE GEORGE C. PRATT,

HONORABLE ROGER J. MINER
Circuit Judges,

HONORABLE EDWARD D. RE
Chief Judge for the
United States Court
of International trade
sitting by designation

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In RE: LAWRENCE B. GREENE and HELENA GREENE,
Debtors.

Docket No. 89-5038

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LAWRENCE B. GREENE and HELENA GREENE,

Debtors-Appellants,

- against -

BARBARA BALABER -STRAUSS as trustee and
MAURICE BAER,

Appellees.

---

This appeal from an order of the United States District Court for the Southern District of New York , Gerard L. Goettel, Judge, came on to be heard on the transcript of the record and was argued. Judge Goettel affirmed an order of the United States Bankruptcy Court of the Southern Distruct of New York, Howard Schwartzberg, Judge, that denied the debtors, Lawrence B. Greene and Helena Greene, dischargees in bankruptcy pursuant to 11 U.S.C. Section 727 , and denied their motion for a new trial on the discharge issues.

ON CIDERATION WHEREOF, it is now ordered that the order of the district court is affirmed for substantially the reasons stated in Judge Goettel's decision dated July 19,1989.

George C. Pratt U.S.C.J

Roger J. Miner U.S.C.J.

Edward D. Re, Ch.J.,
U.S.C.I.T.

NB This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re;
LAWRENCE B. GREENE and HELENA GREENE, Debtors, No. 85 B 20497(HS)

---

LAWRENCE B. GREENE and HELENA GREENE Appellants,

- against - No. 87 Civ. 8381(GLG)

BARBARA BALABER-STRAUSS as Trustee and MAURICE BAER, Appellee.

MEMORANDUM DECISION

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Appellants present what appear to be rather novel arguments on this appeal in an attempt to confine the bankruptcy court's ability to extend the deadline fixed by the Bankruptcy Rules for the filing of both complaints asserting the non-dischargeability of individual debts under 11 U.S.C. Section 523 (c) and objections to overall discharge under 11 U.S.C. Section 727 (a). We are referred to no case law which specifically addresses the arguments made herein. We need not be the first. Whatever the

merits of appellants' arguments, they are obviated by our holding that the action taken by the bankruptcy court in extending the deadline for filing complaints or objections to discharge was justified as an exercise of the court's authority to modify deadlines, sua sponte, in the interest of preventing abuse of the bankruptcy process.

I. BACKGROUND

The debtors (appellants herein) were owners and/or operators of various business entities involved with the manufacture of zippers. The zipper business, by its very nature, is up and down, and it appears that it was more down than up for the debtors. On October 21, 1985, the debtors filed a joint Chapter 11 petition in the bankruptcy court of this district, which case subsequently was converted to Chapter 7 on motion of the debtors' principal creditors. In re Greene, 57 B.R. 272 ,278 (Bankr. S.D. N.Y. 1986).

The Major asset of the estate was a once luxurious but then dilapidated 14-room home in Larchmont

New York overlooking Long Island Sound. At the time of the Chapter 11 filing, debts owing to the first and second mortgagees had gone unpaid for a lengthy period of time, as had taxes and insurance premiums on the property. On April 18, 1985 , the first mortgagee obtained a foreclosure judgment on the property in New York Supreme Court. The Chapter 11 petition was filed on the day before the scheduled foreclosure sale. After what can only be characterized as obstreperous behavior by the debtors designed quite obviously to delay or thwart the liquidation of the estate's only substantial asset, the property finally was sold at public auction pursuant to court order on July 22,1986.[2]

---

1 An earlier attempt by the debtors to avail themselves of Chapter 13 had been dismissed. Id. at 273.

2 We will not belabor the reader with a full recitation of the litany of obstructionist tactics engaged in by the debtors in their attempts to forestall or block the sale. We note simply that the sale and "eviction" of the debtors were accomplished only after issuance of several court orders necessitated by the debtors' intransigence. Several aspects of these various orders were the subjects of appeals by the debtors, often in a pro se capacity (one such pro se appeal actually enjoyed a brief but unsuccessful presentation, allegedly

The troubling resonse engendered by the trustee's court-ordered efforts to sell the debtors' property is not the only aspect of concern in this Chapter 7 case. Pursuant to and consistent with Bankruptcy Rules 4004 and 4007 , the bankruptcy court issued a notice to creditors dated February 11, 1986 ("February 11 Notice " which fixed May 6, 1986 as the last day on which interested parties could file complaints to determine the dischargeability of any debt or object to the debtors' overall discharge under 11 U.S.C. Section 523 (c) & 727(a) , respectively. That period expired with no complaint or objection to discharge having been received by the court. A discharge hearing had been scheduled pursuant to the February 11 Notice for May 13. For reasons not entirely clear ( but , in any event, not material here), the discharge hearing was adjourned (perhaps more than once) until some future date(s) .

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ex parte and without notice to the trustee, before Supreme Court Justice Thurgood Marshall), but all legal actions taken by the trustee related to the sale were affirmed.

On October 13, 1986, prior to entry of a discharge order, Maurice Baer unexpectedly filed a motion on notice to the debtors to be added as a creditor in the case. It appears that Baer leased space to the debtors for operation of their business. His claim is for $ 80,000 based on the debtors' alleged misappropriation of a bond pledged by the debtors as security for rent due under the lease. Evidence ultimately was presented to the bankruptcy court which suggested that the debtors failed to accou account for proceeds they realized when they cashed in the bond after submitting a sworn affidavit to the transfer agent that the bond was lost.

Bear was not listed on the original schedule of creditors filed by the debtors. Indeed, he learned of the Chapter 7 case only after initiating an action in state court against the debtors and the now-defunct business lessee they operated. Upon receipt of the summons and complaint in that action , and by letter dated September 1,1986, the

debtors advised Baer'a counsel of the pending Chapter case. Thereafter, Baer filed his motion, made returnable October 31, to be added as a creditor.

On October 27, two weeks after Baer's motion was served and just four days before it was scheduled to be heard, the debtors filed an amended schedule of creditors listing, among others, Baer. Also added were claims by the debtors' three sons, each for the amount of $ 35,000 in alleged loans made to the debtors/parents, as well as claims by Helena Greenes father and sister. Pursuant thereto , the bankruptcy court issued a notice to the newly listed creditors advising them that they had been listed in the amended schedule and that December 26,1986 had been fixed as the last day on which they could file complaints or objections under 11 U.S.C. Section 523(c) & 727 (a) [3] ("October 27 Notice").

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3 On March 4,1987, and on motion of the trustee, the bankruptcy court expunged the claims asserted in the amended schedule of creditors. See In re Greene, 71 B.R. 104 (S.D.N.Y. 1987). That decision did not operate to affect Baer's claim which , as will be discussed infra, by that time expressly had been added by court order.

On the morning of October 31, argument on Bear's motion went forward as scheduled.[4] The debtors, who were then proceeding pro se,[5] failed to show for that argument. The court granted Baer's motion, and went on to note that the court "will extend" until December 26 the time for filing complaints or objections to discharge. At that point, the trustee asked " Will that extension of time enure to the benefit of the trustee as well insofar as this is a new claim by a new creditor of which the trustee was unaware?" The court responded, "Yes. You can put that in the order." An order granting Baer's motion and setting the deadline for complaints or objections at December 26 was entered by the bankruptcy court on November 26, 1986 ("November 26 Order" ).[6]

On December 23, 1986 , within the deadline set by the court, Bear and the trustee jointly filed a complaint objecting to the dischargeability of Baer's debt under 11 U.S.C. Section 523(c) and objecting to the debtors' overall discharge under, 11 U.S.C. Section 727(a). The bankruptcy court denied the

discharge under 11 U.S.C. Section 727 (a) and, as a result thereof, found it unnecessary to reach Baer's individual claim under 11 U.S.C. Section 523(c). Baer v. Greene (In re Greene) 81 B.R. 829,834 (Bankr. S.D.N.Y. 1988). In reaching that conclusion, the bankruptcy court found clear and convincing evidence that the debtors had concealed assets and information from the trustee and, in the process of doing so, had violated a previous order of the court directing the debtors to turn over to the trustee a complete set of financial records. Id.

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4 Debtors' counsel suggests that the October 31 argument was gratuitious in light of the October 27 amended filing. More to the point , counsel makes much of the debtors' "voluntary" amendment, presumably implying that it constitutes an expression of the debtors' good faith. To the contrary, that the amended filing appears to be a calculated response forced by Baer's intervention seems obvious both from the timing and substance of the amended schedule.

5 Original, court-appointed counsel had since withdrawn, citing philosophical differences with their clients.

6 The written order makes no specific mention of the court's decision , expressly made on the record, to allow the extension to operate for the benefit of the trustee as well.

II DISCUSSION

In this consolidated appeal, the debtors challenge three aspects of the decision denying discharge which we consider seriatim.

1. The bankruptcy court lacked jurisdiction to entertain the joint complaint.

The principal issue raised on this appeal is that the joint complaint filed by Baer and the trustee was untimely and that the November 26 Order permitting its late filing was issued without authority. It is argued, therefore, that the bankruptcy court lacked jurisdiction to entertain the joint complaint.

The nub of counsel's argument is as follows. Under Bankruptcy Rule 4004 (a), a complaint objecting to the debtor's discharge under (11 U.S.C.) Section727 (a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to (11 U.S.C.) Section 342." Paragraph (b) of that rule adds: " On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing

a complaint objecting to discharge. The motion shall be made before such time has expired." Similar conditions are set forth for the filing of complaints objecting to the discharge of individual debts under 11 U.S.C. Section 523 (c). See Bankruptcy Rule 4007 (b) . Counsel notes that these requirements are strictly applied so that the salutary purpose of the "frest-start" principle will be given effect and the debtor will not be left forever exposed to the assertion of creditors' claims. See 8 Collier on Bankruptcy Section 4004.04(1),at p.4007-12 (1989) ( and cases cited therein): id. Section 4007.05, at p. 5,at p.4007-13 (and cases cited therein).

In this case, pursuant to the February 11 Notice the court had correctly fixed the filing deadline at May 6,1986 consistent with the above rules. Neither the trustee nor any creditor had filed a complaint or objection pursuant to 11 U.S.C. Section 523(c) or 727 (a) by that deedline, nor had any party in interest made a motion for extension for cause. Counsel argues, therefore, that the joint complaint was un-

timely and any court action or order permitting its filing was without authorization.

Counsel emphasizes that strict adherence to these limitations creates no unfairness, at least as to Bear, since the Code accommodates the interests of creditors not listed in the original schedule who became aware of the bankruptcy after discharge. Under 11 U.S.C. section 523(a)(3), a Chapter 7 "discharge " will not operate to discharge a debtor from any debt not listed in the schedule of creditors in time to permit--

> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection (generally dealing with debts incurred through fraud or defalcation or child or spousal support), timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
>
> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such filing and request....

Thus , it is asserted, Baer's claim would have been protected from discharge so long as he can demon-

strate that he had no knowledge of the case so as to permit the timely filing of a proof of claim and complaint. Consequently, debtors' counsel argues, to the extent the joint complaint urged that Baer's claim was nondischargeable under 11 U.S.C. Section 523(c), the complaint was both untimely and unnecessary since Baer's claim is deemed nondischargeable by 11 U.S.C. Section 523 (a)(3).[8]

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7 In addition, Bankruptcy Rule 1009 provides that a schedule of creditors may be amended voluntarily by the debtor at any time before the case is closed or on motion by an interested party. The 1983 Advisory Committee note to that rule states: "If a list is amended to include an additional creditor, the effect on the dischargeability of the creditor's claim is governed by the provisions of Section 523 (a)(3) is triggered only after "discharge," counsel argues that the comment to Rule 1009 contemplates application of the section's provisions pre-discharge but post-filling deadline as well. But see W. Norton, Jr., Bankruptcy Law and Practice:Bankruptcy Rules 254 (1987-88 ed.) (Editors' Comment (1983) on Rule 4004) (nothing "distinguisheing feature of Code Section 523 is that it comes into play only if a debtor receives a general discharge under Code Section 727").

As to that part of the complaint which objects to the debtor's discharge under 11 U.S.C. Section727 (a), counsel contends that Baer had no such right to object. Bankruptcy Rule 4007 (c) provides that a "complaint other than under (11 U.S.C.) 523 (c) may be filed at any time, " thereby protecting creditors utilizing 11 U.S.C. Section 523(a)(3) from any arbitrary filing deadline. Rule 4004 , however,which implements 11 U.S.C. Section 727 (a), contains no similar waiver of the filing deadline. It is counsel's contention that this omission is not merely a "gap" in the law; rather, counsel argues that this represents a conscious choice by Congress reflecting a balancing of the debtor's need for a reasonably timely realization of the fresh-start goal with the creditor's right to protection of his or her property interest. Since the latter is protected by 11 U.S.C. Section 523 (a)(3), it is urged, Congress did not see the need to prolong the Charter 7 case and preserve for a creditor in Baer's position the additional right to object to the debtor's overall discharge. Since Baer allegedly did not have that

right, it follows that the trustee could not "piggyback" on Baer's non-existent right and late-files an objection under 11 U.S.C. Section 727(a).[9]

Counsel has made a commendable effort to frame this appeal in the legal light most favorable to the debtors, and it appears there is virtually no case law addressing the specific argument advanced.[10]

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8 We emphasize here that the protection afforded Baer by counsel's construction of the Bankruptcy Code and rules is not so automatic as implied. Baer must be able to demonstrate that he had no notice or knowledge of the case in time to permit filing of a proof of claim or complaint on dischargeability. Counsel's retort, obviously, is that if Baer cannot meet that threshold he should not be allowed the benefit of an extension which will operate at the debtor's expense by delaying discharge.

9 Counsel also argues that even if Baer could file an objection under 11 U.S.C. Section 727(a), the trustee nevertheless prevented from "piggybacking" on that right. Alternatively, counsel contends that for Baer (and, derivatively, the trustee) to exercise objection rights, he must at minimum have filed a motion consistent with the spirit of Bankruptcy Rule 4004 (c) seeking court permission to object Ciben our ultimate holding , we need not pass upon the propriety of either these additional arguments or the principal argument herein advanced.

Whatever the merits of counsel's position, however (and we do not pass upon them), such arguments may only be put forth in the context of a Chapter 7 proceeding that has bee pursued in good faith by the debtor. See In re Greenwalt, 63 B.R. 555,558-59 (Bankr.D. Colo. 1986) (noting Chapter 7 discharge can be utilized only by debtor who has not abused the process). Notwithstanding counsel's efforts to mask the the reality of this case, information came to the bankruptcy court's attention prior to issuance of the November 26 Order that certainly would give rise to suspicions that the process was being abused by the debtors. Given that reality, a different analysis must follow.

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10 Appellants cite numerous cases holding that the filing deadline cannot be revived or extended once expired. See, e.g., In re Klein, 64 B.R. 372, 375-76 (Bankr. E.D.N.Y. 1986) (collecting cases). These holdings are inapposite, however, since the creditors seeking extensions in those cases had knowledge of the bankruptcy prior to the filing deadline. The only case to which we are referred that is directly on point is In re Eliscu, 85 B.R. 480 (Bankr. N.D. ILL. 1988). Eliscu holds that, in order to ensure that the creditor's Fifth Amendment property and due process rights are protected, a court may extend

Under 11 U.S.C. Section 105 (a), the bankruptcy court is provided a vehicle allowing " broad exercise of power in the administration of a bankruptcy case." 2 collier on Bankruptcy Section 105. 01 , at p. 105-1 (1989). That provision provides in full ( emphasis added):

> The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provisions of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent any abuse of process.

Notwithstanding the existence of filing deadlines and the requirements for motions seeking extensions

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the filing deadline for those creditors who became aware of the bankruptcy after the filing deadline passes. Id. at 482 The trustee relies primarily on this case its constitutional concerns. Simple re;oamce pm Eliscu, however, fails to come to grips with appellants' primary contention to wit, that Baer's Fifth Amendment property rights are fully protected by 11 U.S.C. Section 523 (a)(3). Indeed, on that basis, appellants argue that Eliscu, which does not truly address this argument, was wrongly decide. We are not prepared to go that far. Aconsiderable argument can be made that appellants have simply hit on a "gap" in the law, and that the bankruptcy court has inherent authority to bridge that gap.

therefrom, we think that 11 U.S.C. Section 105(a) commits to the sound discretion of the bankruptcy court the authority to take the actions embodied in the interests of protecting the process from possible abuse. Cf. In re Klein, 64 B.R. 372, 376-77 (Bankr. ED.NY. 1986) (and cases cited therein) (noting court may utilize its equitable authority and extend filing deadline to correct administrative errors when creditors have no knowledge of those errors)errors). That authority, in our view , includes the courts' decisions here both to allow Baer the option of filing a complaint or objection pursuant to 11 U.S.C. Section 523 (c) or 727 (a) and to allow the trustee to piggyback on the latter.[11]

That this case evinced a potential abuse of proces when the October 27 Notice and November 26 Order issued is manifest from the record of this proceeding.[11]

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11 In fact, we think as a matter of law that any extension of the deadline for objections under 11 U.S.C. Section 727(a) would automatically run to the trustee as "representative of the estate." 11 U.S.C. Section 323(a). Such a right would be limited to 11 U.S.C. Section 727(a)since the trustee does not have standing to establish the non-discharge-

That this case evinced a potential abuse of process when the October 27 Notice and November 26 Order issued is manifest from the record of this proceeding.[12] For example, Baer filed his motion to be added as a creditor on October 13. For all intents and purposes, that motion was tantamount to filing a proof of claim. See Bankruptcy Rule 3001.[13] The bankruptcy court, therefore, would not be exceeding its discretion by according that filing certain weight. Cf. Bankruptcy Rule 3001 (f) (noting proof of claim "shall constitute prima facie evidence of the validity and amount of the claim"). Consequently, not only can the filing reasonably de deemed to have raised questions as to why Baer was not listed on the original schedule of creditors, but the motion's substance certainly raised suspicions that the debtors has concealed relevant information and /or assets.

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abilityof an individual debt under 11 U.S.C. section 523(c). In re Farmer, 786 F.2d 618 ,620 (4th Cir 1986).

12 Discovery conducted by the trustee after filing of the joint complaint confirmed the scurrilous

Further, and arguably in response to Baer's intervention, the debtors' filed an amended schedule of creditors which listed, among others, claims by the debtors' three sons and claims by Helena Greene's father and sister. Given its timing and content, the amended schedule fairly raised additional suspicions that the process was being used for purposes other than a good-faith effort to secure a fresh start.

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nature of certain of the debtors' actions in this case, and revealed additional transgressions. See In re Greene, 81 B.R. 829, 831-33 (Bankr. S.D.N.Y. 1988). For purposes of the instant argument, however, we must confine ourselves to those matters brought to the bankruptcy court's attention prior to issuance of the November 26 Order. To do otherwise would be an exercise in post hoc reasoning.

13 The motion included an affidavit by Baer's counsel outlinging the bases for Baer's claim.

Moreover, as outlined supra, the utterly obstreperous behavior of the debtors in hindering the trustee's efforts to liquidate the only revealed asset of the estate of any substance ( the Larchmont property ) suggests a calculated desire to benefit from the automatic stay for an indefinite period by blocking any meningful progress in the Chapter 7 proceeding. Indeed, after sale of the property in September 1986, the debtors immediately applied for homestead exemptions under 11 U.S.C. Section 522(f). Hearings were held on these requests on October 14 and 15 , two weeks before issuance of the October 27 Notice, and again on November 12, two weeks before issuance of the November 26 Order. The bankruptcy court ultimately denied payment of the exemptions until the trustee was required to make distributions under 11 U.S.C. Section 726. Judge Sweet affirmed that order on appeal, stating: " Here, the transcripts of the hearings before the bankruptcy judge evidence a concern on the court's part that these appellants may have abused the process and

may not be the "honest debtor" who are entitled to discharge and exemption.... Under these circumstances, the decision to withhold the exemotions can be deemed reasonable, and the Greenes' appeal is denied. " Greene v. Balaber-Strauss, 76 B.R. 940,942 (S.D.N.Y. 1987).

Thus , when the bankruptcy court issued its October 27 Notice and November 26 order, it had numerous indicia before it suggesting that the process potentially had been and was being abused. Obviously, the bankruptcy court did not know with certainty at those times that the process was being abused. Certainty, however, is not the pertinent standard. The decision as to whether the bankruptcy court should exercise its authority under 11 U.S.C. Section 105 (a) in a given case is committed to the sound discretion of that forum, which is in the best position to evaluate the various aspects and subtleties of the pending proceeding. Consequently , we find that unless it can be demonstrated that the court abused that discretion, the court's reasonable exercise

of its equitable authority under 11 U.S.C. Section 105(a) should not be disturbed. There were more than sufficient indicia suggesting the need to extend, sua sponte, the filing deadline in this case, and the court's decision in that regard was not, therefore, an abuse of its discretion.

In addition, the specific action taken--extending the deadline until December 26,1986 --also did not constitute an abuse of the court's discretion. When exercising its equitable authority to extend the deadlines set by Bankruptcy Rules 4004 and 4007 , the court must remain sensitive to dual concerns that, in our view, are neither competing nor incompatible: the need to ensure the integrity and fairness of the process while at the same time providing assurance to the debtor that the fresh-start goal will be reasonably and timely realized, barring complications, if the process is utilized in good faith. Those concerns were satisfied here. The December 26 date described in the October 27 Notice, and ratified by the November 26 Order

did not come out of thin air. That date obviously was fixed in contemplation of a 60 day filing period pegged to the October 27 amended schedule, and that 60- day time frame finds its genesis in the spirit of Bankruptcy Rules 4004 and 4007. Each of those rules provides a self-executing deadline for the filing of complaints and objections under 11 U.S.C. Section 523(c) & 727 (a) -- " not later than 60 days following the first date set for the meeting of creditors held pursuant to (11 U.S.C.) Section 341 (a)." By using the filing date of the amended schedule of creditors as the relevant referent, the bankruptcy court defined a new 60 day period in which newly added creditors could file individual complaints and, coupled with the trustee, overall objections. That period of time would not so unreasonably delay the possibility of discharge as to render the court's action an abuse of discretion. To the contrary, we think that specific application of the court's authority inder 11 U.S.C. Section 105 (a) was entirely appropriate within the context of this case.

We recognize that the court's actions in extending the filing deadline in this case appear to have been taken as a matter of course. Thus, the October 27 Notice which originally set the extension and fixed the December 26 date appears to be a standard form that is made applicable to the facts of a particular case and is then sent out to newly added creditors any time creditors are added in a pending proceeding. Whether a bankruptcy court has the authority to do this prior to discharge but after the original deadline has passed, justifying its actions as a means of bridging whatever "gap" allegedly may exist under cyrrebt kawm us a natter we di bit decude. The actions of the bankruptcy court in this case were justified, at minimum, under the authority provided by 11 U.S.C. Section 105 (a) in the interest of protecting the process from abuse, and on that basis they are affirmed.

Consequently, we find that the bankruptcy court had jurisdiction to entertain the joint complaint at issue and appellants' first challenge to the underlying decision is rejected.

2. A new trial is warranted due to the trustee's discovery violations

In anticipation of the trial on the joint complaint, the debtors' counsel served an interrogatory on the trustee requesting copies of any bank records the trustee had obtained as well as any other documents she intended to introduce at trial.[14] The trustee responded that she was not obligated to prepare the debtors' case and that, in any event, whatever documents she had iscovered were known and equally available to the debtors ( since she had discovered only the debtors' own records). Appellants contend that this refusal to turn over documents prejudiced their case at trial, and the bankruptcy court's failure to sanction the trustee's behavior should result in a new trial. We reject that contention. See 8 C. Wright & Miller, Federal Practice and Procedure Section 2174 at 552 & n. 93 ( 1970 & supp 1988) ( if evidence " is equally available to both parties, the party seeking the information should do his own research" ). In addition, much of this material constituted rebuttal

and impeachment evidence that is not generally required to be disclosed.

3. The decision below is clearly erroneous

This claim is completely without merit. The trustee more than met her burden of showing that the debtors had concealed records and otherwise acted in a manner dictating denial of discharge. On the merits, we generally adopt the sound reasoning of the bankruptcy court's decision [15], In re Greene, 81 B.R. 829 (Bankr. S.D.N.Y. 1988).

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14 The trustee learned, through subpoena on the court reporter designed to determine the name on the checking account that was being used by the debtors to pay for court transcripts, that Lawrence Greene had a checking account in his name at Chemical Bank that had not been revealed. A subsequent subpoena was served on the bank to learn more about the account, which led to further questionable conduct by the Greenes. See In re Greene , 81 B.R. 829,832 (Bankr. SD.N.Y. 1988).

15 The debtors object that certain of the facts cited by the bankruptcy court are erroneous, and reliance on those misunderstandings of events fatally infected

Conclusion

For all of the above reasons, the actions of the bankruptcy court subject to this consolidated appeal are affirmed.

AFFIRMED.

Dated: White Plains, N.Y.
July 19, 1989

GERARD L. GOETTEL
U.S.D.J.

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the decision. We have thoroughly reviewed the factual record, and any reliance on factual misstatements in this case obviously constitutes nothing more than harmless error. There are more than sufficient unrebutted, "hard" facts that warranted the bankruptcy court's decision denying discharge. Notwith standing counsel's heroic effort to obfuscate the reality of this case my magnifying any alleged factual errors, the " hard" facts tell a different story. As Ebenezer Elliott one said, " Facts are stubborn things,"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:
LAWRENCE B. GREENE and HELENA GREENE — Case No. 85 B 20497(HS)

Debtors, — ORDER

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ORDERED, that the Debtors' motion for appointment of replacement pro bono counsel be denied with respect to the complaint objecting to the discharge of the debtors, and it is further

ORDERED, that the Debtors' motion seeking the use of estate funds to pay for the Debtors counsel fees be and it hereby is denied, ~~except that the funds earmarked as the Debtors' homestead exemptions pursuant to the prior orders of this Court may be segregated and used for the Debtors' legal fees in this bankruptcy case, and it~~ is further

ORDERED, that the Office of the United States Trustee be and it hereby is directed to submit any papers in response to the Debtors' motion seeking appointment of pro bono counsel with respect to the "Gibraltar Corporation of America"

Commerical matter, on or before September 29,1987.

Dated: White Plains, New York
September 22, 1987

HOWARD SCHWARTZBERG
UNITED STATES BANKRUPTCY
JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

Case No. 85 B 20497
86 ADV. 6099

LAWRENCE B. GREENE and
HELENA GREENE,

Debtors.

MAURICE BAER and BARBARA BALABER-STRAUSS, as TRUSTEE of the estate of the Debtors,

Plaintiffs.

v.

LAWRENCE B. GREENE and
HELENA GREENE,

Defendants.

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DECISION ON OBJECTIONS TO DISCHARGE AND DISCHARGEABILITY OF DEBT

PRESENT:

BARBARA BALABER-STRAUSS, ESQ.
Trustee and Attorney for Trustee
2 Park Avenue
Suite 2204
New York ,New York 10016

JAMES DO CAMPO, ESQ.
Attorney for Maurice Baer
441 100th Street
Brooklyn , New York 11209

LAWRENCE B. GREENE and
HELENA GREENE , pro se
P.O.Box 1063
Larchmont New York 10538

HOWARD SCHWARTZBERG, United States Bankruptcy Judge.

The Chapter 7 trustee and the debtors' former landlord, Maurice Baer, have jointly moved to deny the debtors' discharge under 11 U.S.C. Section 727. Additionally, the debtors' former landlord has moved under 11U.S.C. Section 527 c to have a business rent claim held nondischargeable because the debtors allegedly misappropriated a bond that was deposited as security for rent for commercial premises leased to the debtors' business. The debtors, Helena Greene and Lawrence A. Greene, are husband and wife who had previously engaged in a zipper manufacturing business under various business names, such as Abbot Closures, Inc., Forum Narrow Fabrics, INC., Nine to Five Zipper Sales, Christopher Ames and Finast Products, Inc.

FINDINGS OF FACT

1. On March 13,1985 , the debtors separately filed their Chapter 13 cases with this court. On August 27, 1985, this court dtermined that the seperate Chapter 13 cases should be dismissed because the debtors were ineligible for relief under

Chapter 13 of the Bankruptcy Code. The court found that their debts exceeded the statutory maximum of undecured and secured amounts delineated in 11U.S.C. Section 109 (e).

2. On October 21, 1985, the day before a mortgage foreclosure sale was scheduled with respect to the debtors' home in Larchmont, New York, the debtors filed with this court a joint petition for relief under Chapter 11 of the Bankruptcy Code. The debtors' major asset was their Mediterranean style home overlooking Long Island Sound, which they wanted to fix up and sell for between $ 750,000 and $ 1,000,000.

3. On January 28, 1986, this court ruled on a motion brought by Gibraltar Corporation of America, the holder of a claim of $ 954,356.08, of which $ 770,000 was secured, that cause had been established for converting the debtors' Chapter 11 case for liquidation under Chapter 7 of the Bankruptcy Code because of a continuing loss or diminution of the estate and an absence of a reas-

onable likelihood of rehabilitation within the meaning of 11 U.S.C. Section 1112 (b)(1). In re Greene, 57 B.R. 272, 13 B.C.D. 1275 (Bankr. S.D.N.Y. 1986). An order for conversion to Chapter 7 of the Code was entered on February 5, 1986, at which time the Chapter 7 trustee in bankruptcy ultimately sold the debtors' house at auction for $ 890,000.

4 On October 27, 1986, the debtor , Helena Greene, filed proofs of claim with the Clerk of the Bankruptcy Court purporting to reflect obligations which she and her husband allegedly owed to various persons, including three obligations to each of her three sons, each in the sum of $ 35,000, represented by three promissory notes dated June 1, 1979. The Trustee's objections to the claims filed by the debtor, Helena Green, were sustained for lack of credible evidence, with the result that the claims were expunged by a ruling March 4, 1987. In re Greene, 71 B.R. 104 (Bankr. S.D.N.Y. 1987).

5, Pursuant to a notice dated February 11, 1986, the court fixed May 6, 1986 as the last day for the filing of a complaint to determine the dischargeability of any debt pursuant to 11 U.S.C. Section 523(c) and the last date for the filing of objections to the debtors' discharge pursuant to 11 U.S.C. Section 727(a). On October 27, 1986, the debtors filed an amendment to the schedules annexed to their petition in order to list assitional creditors who had not previously been scheduled, including the plaintiff, Maurice Baer. On November 26, 1986, the court entered an order extending the time for the newly added creditors to object to the debtors' discharge or the dischargeability of their claims. The last date for filing such objections was fixed as December 26,1986.

6. On December 23, 1986, Maurice Baer, one of the newly added creditors, filed a complaint objecting to the debtors' discharge pursuant to 11 U.S.C. Section 727(a). The Chapter 7 trustee joined in the complaint filed by Maurice Baer. Additionally,

Maurice Baer objected to the dischargeability of his claim because of the debtors' alleged misappropriation of the bond which they pledged as security for rent due under business space which the debtors leased from Maurice Baer. The plaintiff contends that the debtors failed to account for the proceeds they received when theycashed in the rent security bond after they submitted to Smith Barney & Co., the transfer agent, a sworn affidavit that the bond which they had previously delivered to their landlord as security for rent was lost. The landlord's representative testified that the security bond was not lost and the funds that the landlord received upon submission of the original bond, in the sum of $13,482.50, had to be refunded to the transfer agent because the debtors had previously cashed in the replacement bond that they received after reporting the original bond as lost.

PERSONAL FINANCIAL RECORDS

7. After the debtors' Chapter 11 case was converted to Chapter 7, on February 5, 1986, the trustee

in bankruptcy sent a printed form letter to the debtors requesting copies of their personal financial records and bank accounts. No personal financial records were turned over to the trustee.

8. On October 7, 1986, the trustee sent a second copy of her printed request for financial records directly to the debtors.

9. On January 16,1987, the trustee obtained from this court an order directing the debtors to turn over to the trustee their financial records.

10. Thereafter, the trustee received a letter from the debtors' attorneys , dated February 12, 1987, which lists records of corporations controlled by the debtors. (Exhibit #5). The letter referred to only one savings account which was stated to have a minimal balance. The letter stated that the debtors had no checking accounts. The debtors' attorneys did not refer to any checking accounts in the individual name of either debtor.

11. Therafter, the trustee served a subpoena on the court reporter in order to learn the name of

the checking account used by the debtors to pay for copies of the transcripts they had ordered. The trustee learned that the debtor , Lawrence B. Greene , maintained a checking account with the Chemical Bank. The trustee then issued a subpoena on January 29,1987, to the Chemical Bank and requested a listing of all checking accounts with the Chemical Bank upon which the debtors were authorized to sign checks.

12. Linda Lewis, an officer of the Chemical Bank, testified that in March of 1987, she received a telephone call from Mr. Greene who said that Chemical Bank should not supply the trustee in bankruptcy with the names of checking accounts for which the debtors were authorized signatories because such information violated his right of privacy. Thereafter, Helena Greene telephoned Ms. Lewis and said that the subpoena was not valid because Barbara Balaber-Strauss was not the trustee in bankruptcy of the corporations as to which the Greenes were the authorized signatories.

13. On March 13,1987 , Mr Lawrence Greene wrote a letter to Chemical Bank objecting to Chemical's honoring the trustee's subpoena for financial documents. He voiced his objection in relevant part as follows:

> Every person has rights under the constitution of the United States and you have violated these rights. Regardless if the party who sent you the subpoena was correct or incorrect in the manner in which they tried to get personal and confidential information you have a responsibility to a depositor, before you turn over any information. You are a keeper of records, and as a keeper of records you can not turn over my records without my consent or knowledge or a Judicial order. You did not have any of the above, when you erred in turning over my personal and confidential records, & that I had permission of the Court to keep from public record you have violated not only my constitutional rights and my rights to privacy, but because of your actions I may be damaged and my family may be damaged. At this time I do not know to what extent that we will all be damaged. But because of your grave error I will hold you resonsible for any and all damages that we will sustain do to your negligence.

14. Included in the bank statements produced was a checking account statement in the name of the debtor Lawrence B. Greene, for the period from January 15, 1986 to February 15,1986, reflecting a clos-

ing balance of $ 16,578.15 . Information as to this account was not revealed by the debtors to the trustee in bankruptcy , notwithstanding that their Chapter 11 case was converted to Chapter 7 on February 5,1986. Copies of the cancelled checks reflect approximately one-half were made out to cash.

15. The trustee also learned from the records furnished by Chemical Bank that for the period from February of 1985 through Septem ber 1986, during the time that the debtors were in Chapter 13 and Chapter 11, they maintained an account known as Christopher Ames Ltd. The New York Secretary of State responded to the trustee in bankruptcy on March 27, 1987, advising her that no such corporation existed. The deposits in this account for the period from October 25,1985 through November 26, 1985, totalled $ 12,923.11. For the period from March of 1986 through September of 1986, during the period that the debtors were in Chapter 7, many of the checks drawn on this account were made out to cash and were endorsed by the debtor, Helena Greene.

16. The trustee's subpoena to Chemical Bank also produced information that the debtor, Helena Greene, was an authorized signatory on an account known as Finast Products, Inc. There were checks drawn on this account by Helena Greene and made payable to cash. As in the case of the account labelled Christopher Ames Ltd., the New York Secretary of State advised the trustee in bankruptcy that no corporation known as Finast Products, Inc. was incorprated in New York. (Exhibit # 20 ).

17. The concealment of the checking account maintained by the debtor, Lawrence B. Greene, which was opened in 1974, and the concealment of the accounts in the name of Christopher Ames Ltd. and Finast Products, Inc., neither of which were shown to exist as separately incorporated entities, although the debtors issued checks for cash in these accounts, were part of the plan of concealment which the debtors pursued during their Chapter 11 and Chapter 7 bankruptcy cases. When the debtors applied to the District Court to proceed in forma pauperis, the debtor,

Lawrence B. Greene , was employed and received a take home income of approximately $ 4,000 per month.

DISCUSSION

The debtors' objection to the complaint filed by Maurice Baer on the ground that it was not timely because it was filed after May 6,1986, the last day originally fixed for filing complaints addressed to the debtors' discharge, lacks merit. Maurice Baer was not listed by the debtors as a creditor in the original petition. After the debtors amended their petition in November of 1986 to add Maurice Baer as a creditor, an order was entered by the court on November 26, 1986, extending the time for the newly listed creditors to file objections to the debtors' discharge until December 26,1986. Maurice Baer timely filed his complaint, which the trustee joined as a participating plaintiff, on December 23, 1986

CONCEALMENT OF FINANCIAL RECORDS

Although a party objecting to a debtor's discharge has the burden under Bankruptcy Rule 4005 of

proving his objection, this rule does not change the initial obligation which is placed upon a debtor of producing records from which the debtors' financial condition may be ascertained. Section 727 (a) of the Bankruptcy Code imposes a duty upon debtors to preserve or keep documentay evidence which would explain the debtor's financial condition. The creditors and the court need not be required to guess what actually occurred because such speculations do not serve as an adequate substitute for credible proof. First Federal Life Insurance Co. v. Martin (IN re Martin) , 698 F.2d 883,888(7th Cir. 1983).

Objections to a discharge must be construed strictly against the objectant and liberally in favor of the debtor because the relief afforded in bankruptcy cases was intended to permit an honest debtor to obtain a fresh start free from debt. Bank of Pennsylvania v. Adlman (In re Adlman), 541 F.2d 995, (2dCir 1976 ), In re Kokoszka, 479 F.2d 990,996 (2d Cir. 1973), aff'd sub nom Kokoszka v. Belford, 417 U.S. 642 ,94 s.ct. 2431, 41 L.Ed.2d

374 reh. denied, 419 Us. 886 , 95 S.Ct. 160, 42 L.Ed. 2d 131 (1974): In re Tabibian, 289 F2d 793, 795 ( 2d Cir. 1961). Nonetheless, in order to obtain the blessings of a general discharge the debtor must r reveal and not conceal his financial condition. As stated in In re Silverman, 10B.R. 727, 731 (Bankr. S.D.N.Y. 1981) : "Complete disclosure is the touch-stone ...." This point was emphasized in In re Underhill, 82 F.2d258, 259-260 ( 2d Cir. 1936 ), cert. den. 299 U.S. 546, 57 S.Ct. 9, 81 L.Ed. 402 (1936):

> Intent to conceal the financial condition' is no longer a necessary element to support an objection to a discharge for failure to keep books. Nix v. Sternberg, 38 F.(2d) 611 (C.C.A.8' certiorari denied 282 U.S. 838, 51 S.Ct. 20, 75 L.Ed. 744 : In re Krulewitch, 60 F.(2d) 1039 (D.C.N.J. The law isnot unqualified in imposing a requirement to keep books or records, and it does not require that if they are kept they shallbe kept in any special form of accounts. It is a question in each instance of reasonableness in the particular circumstances. Complete disclosure is in every case a condition precedent to the granting of the discharge, and if such a disclosure is not possible without the keeping of books or records, then the absence of such amounts to that failure to which the act applies. Nix v. Sternberg, supra: Karger v. Sandler, 62 F.(2) 80 (C.C.A.2): In re Miller, 5 F. Supp. 913 ( D.C. Md.) .

In this case, not only have the debtors failed to turn over to the trustee any bank statements or cancelled checks which might reflect their financial condition, but they have failed to obey an order of this court dated January 16,1987 which directed the debtors to turn over to the trustee, their records regarding their personal financial condition. Indeed, the debtors carried out a scheme of concealment of three checking accounts which they maintained. The Lawrence B. Greene account, which was opened before their Chapter 11 case and continued beyand their conversion to Chapter 7 on February 5, 1986, had a closing balance of $ 16,578.15 on February 15, 1986. Similarly the accounts which they maintained in the names of two non-existing corporations known as Christopher Ames Ltd. and Finast Products, Inc., which they used for personal pruposes were concealed from the trustee. Significantly, the debtors directed the Chemical Bank , where these accounts were maintained, not to furnish the trustee in bankruptcy with any information as to these accounts.

Bankruptcy Rule 1019 (5) requires that a Chapter 11 debtor in possession, in a Chapter 11 case that has been converted to Chapter 7, must "forthwith... turn over to the Chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession...." The debtors maintained the threee checking accounts with Chemical Bank, namely Lawrence B. Greene, individually, Christopher Ames Ltd. and finast Products, Inc. during their Chapter 11 case but failed to turn over to the trustee in bankruptcy any records as to these accounts and tried to prevent Chemical Bank from furnishing information as to these accounts to the trustee in bankruptcy.

Not only have the debtors violated 11 U.S.C. Section 727 (a)(3) by not producing any books or records as to their financial condition, but they have also violated 11U.S.C. Section 727(a) (6) by refusing to obey the court order dated January 16, 1987, which directed them to turnover their financial records to the trustee. The debtors' failure to

turnover their financial records and their concealment of the three checking accounts justifies the denial of their discharges. In re Switzer, 55 B.R. 991 (Bankr. S.D.N.Y. 1986).

In view of the fact that the debtors are not entitled to receive a discharge pursuant to 11 U.S.C. Section 727, there is no point in addressing plaintiff Baer's additional charges as to the nondischargeability of his claim under 11 U.S.C. 523.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the persons in this case in accordance with 28 U.S.C. Section 157 (a). This is a core proceeding within the meaning of 28 U.S.C. 157 (b)(2)(J).

2. The plaintiffs have sustained their burden of proof imposed by Bankruptcy Rule 4005 by clear and convincing evidence that the debtors have concealed recorded information from which their financial condition or business transactions might be ascertained as required by 11 U.S.C. Section 727 (a)(3).

3. The plaintiffs have sustained their burden of proof by clear an convincing evidence that the debtors knowingly and fraudulently withheld from the trustee in bankruptcy bank statements and cancelled checks with respect to three checking accounts which they used for their personal purposes, as proscribed under 11 U.S.C. Section 727 (a) (4).

4. The plaintiffs have sustained their burden of proof by clear and convincing evidence that the debtors have refused to obey a lawful order of this court, dated January 16,1987, directing the debtors to turn over to the trustee their financial records as proscribed under 11 U.S.C. Section 727 (a)(6)(A).

SUBMIT ORDER ON NOTICE in accordance with the foregoing.

Dated: White Plains, New York
January 20,1988

U.S.B.J.